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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRIAN THOMAS MATHEIS et al., Defendants and Appellants.	E064177 (Super.Ct.No. RIF1302549) O P I N I O N

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant Brian Thomas Matheis.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Amy Lou Daniel.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Collette Cavalier and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants and appellants, Brian Thomas Matheis and Amy Lou Daniel, of first degree murder and possession of a firearm by a felon. (Pen. Code, §§ 187, subd. (a), 189, 29800, subd. (a)(1)).[1] The jury also found true that Matheis had committed the murder while lying in wait and had personally discharged a firearm, and that Daniel had participated in a murder in which a principal was armed with a firearm. (§§ 190.2, subd. (a)(15), 12022, subd. (a)(1), 12022.53, subd. (d).) Matheis admitted to one prior strike conviction, one prior serious felony, and one prior prison term. (§§ 667, subds. (a), (b)-(i), 667.5, subd. (b), 1170.12, subds. (a)-(d).) The court sentenced him to life in prison without the possibility of parole, plus 25 years to life and another six-year determinate term. It sentenced Daniel to 25 years to life in prison, plus a one-year determinate term and a three-year concurrent term.

As we shall explain, the evidence at trial showed Daniel and Matheis believed the murder victim had molested Daniel's daughter, and they planned to kill the victim as a result. On appeal, Daniel argues the trial court prejudicially erred in admitting Matheis's out-of-court statements against her. She contends the statements were not against

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Matheis's penal interests within the meaning of Evidence Code section 1230, rendering them inadmissible hearsay. We disagree and affirm the judgment as to Daniel.

Matheis's appointed counsel has filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and requesting that this court conduct an independent review of the record. Matheis personally filed a supplemental brief. We find no arguable issues and affirm the judgment as to Matheis also.

II. FACTS

A. *Prosecution Evidence*

Joshua Fredieu, the victim in this case, was married to Christalyn Swanson. They had two daughters. In August 2012, the family lived in Banning, California. The couple occasionally socialized with Matheis and Daniel, who were an unmarried couple. Fredieu and Daniel worked together, and Daniel's four-year-old daughter attended school and dance classes with one of Fredieu and Swanson's daughters. Daniel's daughter would spend the night at Fredieu and Swanson's home, and the two couples would sometimes use methamphetamine together.[2]

Fredieu's death occurred on August 22, 2012. Daniel's daughter spent the night at Fredieu and Swanson's house one or two days before his death. Matheis and Daniel came to pick up Daniel's daughter at approximately 6:30 a.m. the next morning. Both

[2] At the time of trial in May 2015, Swanson had gone to rehabilitation and had stopped using drugs. She had previously been arrested on a domestic violence charge against Fredieu.

Daniel's daughter and Fredieu and Swanson's daughter were asleep on the couch fully clothed. Daniel and Swanson fed the girls, and at some point, Matheis left without Daniel. Fredieu drove Daniel and her daughter home.

At approximately 8:30 p.m. on August 22, 2012, Swanson received a phone call from Matheis. He asked if Fredieu could give him a ride, but Fredieu was not home, and Swanson told Matheis to call back in 20 minutes. When Matheis called back, she recognized the phone number as belonging to Daniel's brother. This was consistent with the cell phone records of Daniel's brother for that night, which showed six calls from his phone to Fredieu and Swanson's phone.

Fredieu answered the phone and was on it for one to two minutes. Another friend, Daniel Rolfe, was with Fredieu "hanging out." Fredieu and Rolfe had known each other for approximately two years and occasionally used methamphetamine together.[3] After Fredieu received the call, he asked Rolfe if he could borrow his black Honda to drive to Daniel's house. Rolfe refused to let him take the car, but agreed to go with him. When they arrived at Daniel's house, Fredieu introduced Rolfe to two men there and said he would "be right back." He asked Rolfe again if he could take the car and did not say where he wanted to go. Rolfe pushed to go with him, but Fredieu again refused. Rolfe agreed to let him take the car. Rolfe began talking to the two men while Fredieu backed the car out of the driveway. Rolfe looked over his shoulder at the car as Fredieu drove

[3] Rolfe had a 2000 misdemeanor domestic violence conviction.

away, and he was "pretty sure" he saw the silhouette of another person in the front seat of the car, although he did not see anyone get into it.

Rolfe waited with Daniel and the other individuals at her house. He spent the majority of the time outside on the porch swing, but did go inside to use the bathroom. He did not recall seeing Matheis at the house that night. Rolfe became concerned after a few hours had passed and Fredieu had not returned. He called Swanson and said Fredieu had stolen his car. Swanson picked up Rolfe from Daniel's house.

At approximately 10:30 p.m. that same night, a Banning resident heard a "pop" and, within minutes, a crash outside her house. She went outside and found a car crashed into a chain link fence. The location was a one-minute drive or so from Daniel's house. Officers responding to the 911 call regarding the collision found a black Honda crashed into the fence. There was a male in the driver's seat who was obviously deceased. He was later identified as Fredieu. He had a bullet entrance wound behind his right ear and a bullet lodged in the area where his head met his neck. The trajectory of the bullet was consistent with the shooter firing from the passenger seat. An investigator found a bullet casing in Fredieu's shirt. A semiautomatic, .25-caliber handgun had been fired within close range of Fredieu; the gun had been placed either on his skin or very close to the skin. Investigators did not recover any fingerprint or DNA evidence tying either Matheis or Daniel to that crime scene.

Detective Sandra Perea of the Banning Police Department went to Daniel's house the following day, August 23, 2012. At the time, the detective had no information that defendants might be involved in Fredieu's killing. Daniel and Matheis were there, as well as some of Daniel's relatives and Daniel's friend, Kathleen P. The detective talked to Kathleen P., who did not volunteer any relevant information. Detective Perea and another detective talked to Kathleen P. once more on August 29, 2012, and Kathleen P. again did not have any relevant information. The detectives told her she "might go to jail for a homicide." A few days after that interview, Kathleen P. called the detective and said she had not told the truth earlier, and she had relevant information.

Kathleen P. had been staying at Daniel's house for a week on August 22, 2012. Sometime during that week, she overheard Daniel crying in the bathroom. She found Daniel upset and holding her daughter in the bathtub. Daniel was concerned Fredieu had molested her daughter because the area of her genitalia was irritated, and she was asking her daughter if she had been "touched." After repeated questioning, her daughter said the area was "hurting." Kathleen P. was on methamphetamine during this incident but recalled the essential details of it.

Kathleen P. regularly used methamphetamine and was using on the day of Fredieu's death. On the night of August 22, 2012, Daniel told Kathleen P. she had called Fredieu over and was going out. She asked Kathleen P. to watch her daughter. Kathleen P. saw Fredieu and Rolfe at the house later that night, and Matheis was also there. Kathleen P. did not recall seeing Matheis leave, but she did not see him around for much

of the night. She saw Daniel lay black clothing on the bed for Matheis. Then, sometime in the middle of the night, Matheis and Daniel both entered the house wearing black clothing. They hurriedly took off the clothing, put it in the washing machine, and took a shower.

Kathleen P. had been in custody for a little over a month at the time of trial for failing to appear in response to the prosecutor's subpoena. She appeared unwillingly at trial after an investigator had found her in hiding. She was concerned for her safety; it was not a good thing to be perceived as a "rat" in jail and on the streets. Kathleen P. had used methamphetamine for 13 years, and the prosecutor was helping her get into a rehabilitation program. She admitted that, as a result of using drugs, she might misperceive the meanings of things, and her memory was somewhat unclear. She also acknowledged that Banning was a small town in the sense that all the drug users knew one another, and "word kind of gets around quickly about certain things." She further admitted she had lied to police officers before.[4]

Daniel took her daughter to the hospital on August 23, 2012, the day after Fredieu's death. Daniel told the examining doctor that she suspected abuse had occurred when her daughter slept at a friend's house two days before. She reported redness "[a]round the external vagina area" and urinary incontinence. The doctor did not find any redness, swelling, tenderness, discharge, lesions, lacerations, bruising, or other signs

[4] Kathleen P. had a conviction in 2003 for misdemeanor domestic violence, one in 2004 for felony assault with force likely to produce great bodily injury, one in 2005 for felony domestic violence, one in 2010 for felony domestic violence, and one in 2012 for felony fraud.

of trauma. In short, the doctor found Daniel's daughter had "'[n]ormal genitalia for [her] age.'" After the examination, Daniel and Matheis went out of state for a few weeks.

A confidential informant led officers to talk to Brennon Nicholson on October 10, 2012. A few months before that date, Nicholson was at a friend's house when Daniel showed up at around 6:00 or 6:30 a.m. He had never met her before. She had a bandanna with a semiautomatic, small caliber handgun inside it. Nicholson left the house and returned that same evening. Daniel was there again and still had the gun in the bandanna. She asked him to walk up the street with her and took the gun with her when they left the house. Up the street, she walked into some bushes while Nicholson waited. She came out a minute or so later and did not have the gun in the bandanna anymore. When the officers contacted Nicholson, he took them to the spot where Daniel walked into the bushes. According to Nicholson, the officers suggested he would be deemed an accessory to murder if he did not help them, and they insisted he tell them he saw Daniel with a gun. According to Detective Perea, she told him she could either make him a focus of the investigation, or he could cooperate as a witness. Nicholson maintained at trial that he had not invented the story and he had seen Daniel with a gun.[5]

Officers searched the area to which Nicholson took them but did not find a gun. The Riverside County Sheriff's Department K-9 unit searched the area after that. The three dogs in the K-9 unit did not locate a gun. All three dogs independently exhibited a

[5] Nicholson was using methamphetamine at the time of these events and had convictions for possession of a stolen vehicle and possession of burglary tools in 2014.

change of behavior in the same general area, which indicated that they may have detected the odor of gunpowder, but the dogs were unable to pinpoint the source of the odor.

Erick J. met Matheis in a Riverside County jail. He voluntarily offered the police information he had learned from Matheis. Erick J. was jailed for attempted murder, robbery, and two counts of possession of a firearm.[6] Erick J. conceded that there had been times in his life when he was "willing to do dishonest things to get by." Before he went to the police, he had been offered a plea deal of five years. He was hoping to be offered a better deal in exchange for his testimony. He eventually accepted a plea deal of three years in his case, and he pled guilty to only two counts of possession of a firearm. The written plea deal required him to testify truthfully in this case and cooperate with law enforcement.

Erick J. and Matheis were housed in the same pod and had access to the same dayroom. The two talked and discovered Matheis knew Erick J.'s brother-in-law, Harvest Armstrong, and some other shared acquaintances. Erick J. learned Matheis was "involved in something" from Armstrong, when Erick J. called Armstrong from jail. Armstrong was vague and did not go into detail.

[6] Erick J. had an additional criminal record, including a 1996 misdemeanor conviction for giving a false name to police, a 1996 felony conviction for vehicle theft, a 1999 felony conviction for carrying a gun, a 1998 felony conviction for possession for sale of a controlled substance, a 2001 felony conviction for possession for sale of a controlled substance, a 2005 felony conviction for petty theft with a prior, a 2006 felony conviction for conspiracy, a 2007 felony conviction for vehicle theft, a 2010 felony conviction for burglary, and a 2014 conviction for burglary.

Erick J. asked Matheis what he was involved in. Although Matheis was in custody on domestic violence charges for fighting with Daniel, Matheis said he had killed a man for molesting his girlfriend's daughter, and he identified Daniel as his girlfriend. Daniel's daughter had gone to the victim's house to play and was naked when Matheis and Daniel arrived to pick her up. The victim said the girl was naked because she had taken a bath. Matheis and Daniel suspected the girl had been molested and took her home. They took her to the hospital because the area of her genitalia was irritated, and the doctor's examination confirmed she had been molested. They were "pretty angry."

Matheis said he and Daniel planned to kill the victim. The plan was for Daniel to call the victim and ask for a ride to the store. She made the call and the victim came to her house. Daniel wanted to go with Matheis and the victim, but Matheis would not allow her to go. Matheis was careful not to touch the victim's car and leave fingerprints. He and the victim drove to a convenience store, where he told the victim he wanted to buy cigarettes. Inside the store, Matheis put on latex gloves. From there, he directed the victim to drive to a commercial warehouse area. He told the victim he knew what he had done to Daniel's daughter and shot him with a .25-caliber handgun in the head, just above his right ear. The car coasted and crashed into a fence. Matheis jumped on the hood of the car and over the fence and ran from the scene.

Matheis ran to a friend's house, where his friend drove him to Walmart, and Matheis bought clothes and a phone. He changed clothes and threw his old clothes in a dumpster at Walmart. From Walmart, he went to Armstrong's home at the Morongo

Indian Reservation, but Armstrong was not home. Three men with bandannas masking their faces questioned him while he waited for Armstrong. They asked him why he was there and what had happened, and he told them he "had to handle some business down by the tracks." They left to verify his story, and when they came back, they told him Armstrong was not coming, and he had to leave. The men and a woman drove him to Beaumont. Matheis avoided Daniel for two to three days, and then the two of them went out of state. Erick J. could not recall which state they went to, though he thought it started with an "M." Matheis said they had gotten rid of the gun and asked Erick J. if he could be convicted without the murder weapon.

Matheis also told Erick J. about a phone call he made to Daniel from the jail. Matheis was concerned Daniel was going to "tell on him" because they had fought. He had hit her in the mouth and knocked her tooth out. Matheis told her "[t]hat he was going to hold his mud, and as long as she held her mud, everything would be cool."

After Erick J. told officers about this call, Detective Perea obtained a recorded jailhouse phone call between Matheis and Daniel. During the call, Matheis apologized to Daniel and said he "never meant to hurt [her] at all," and she responded, "You knocked my teeth out." They then had the following exchange:

"MATHEIS: If you would have went in there and told 'em you were lying and that you just wanted me out of your house, I—I would've been set free, but, I—I didn't want you to lie no more. Like you said, you're done lying, ah, you held your mud about everything else, right?

"DANIEL: Yeah, they were trying to tell me that you said something.

"MATHEIS: Fuck that, I didn't say shit.

"DANIEL: They came at me about . . . .

"MATHEIS: I didn't.

"DANIEL: . . . oh, and then the other thing with Joshua, they tried to say that, ah.

"MATHEIS: You know me.

"DANIEL: They asked me, like, where I hid the gun—they knew I hid the gun.

"MATHEIS: They fuckin.'

"DANIEL: And I was like, 'What gun, what—you thought he with a gun, what are you talking about?' Like, 'I thought he got hit in a car.'

"MATHEIS: Yeah, hey baby girl, listen—they're lying, All right."

Matheis later mentioned pictures of the two of them "going to . . . Minnesota and back."

B. *Defense Evidence*

Timothy Stanley was Matheis's cell mate for two months when they were in the same pod as Erick J.[7] Stanley never talked to Matheis about any alleged murders in which Matheis was involved. He also never heard other people in custody talking about the murder.

[7] Stanley had a 2014 conviction for grand theft, 2008 convictions for grand theft auto and possession of stolen property, a 2004 conviction for residential burglary, a 2002 misdemeanor conviction for petty theft, 2001 convictions for grand theft auto and possession of stolen property, a 1998 conviction for residential burglary, a 1989 conviction for grand theft auto, and a 1984 conviction for second degree burglary.

Stanley and Erick J. were porters on the same three-man team, which meant they were in charge of cleaning while the other inmates were locked down. Erick J. talked to Stanley about how he felt wronged in his case and felt the offer for five years was too much time. Erick J. was frequently frustrated about his case and "got pretty dramatic" about it. Stanley observed Erick J. talking to "basically everybody" in their pod. He believed Erick J. was "'full of crap.'"

III. DISCUSSION

A. *Daniel's Appeal*

The People filed a motion to admit Matheis's jailhouse statements to Erick J. against both defendants, arguing the statements were nontestimonial and fell firmly within the hearsay exception for declarations against penal interest. The court granted the motion. Daniel contends the court prejudicially erred in admitting the following statements against her: (1) Matheis and Daniel picked up Daniel's daughter and saw her naked at Fredieu's house; (2) they became suspicious her daughter had been molested and took her to the hospital; (3) they learned her daughter had been molested from the doctor's examination and were angry; and (4) they planned to kill Fredieu and Daniel lured him to her house with a phone call. Daniel argues these statements showing Daniel's knowledge and state of mind were not against Matheis's penal interests. We disagree.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 534.) The hearsay rule renders inadmissible "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) The hearsay exception for declarations against penal interest, codified in Evidence Code section 1230, has three prongs: (1) "the declarant is unavailable"; (2) "the declaration was against the declarant's penal interest when made"; and (3) "the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

This exception does not apply to any statements or portions of statements that are not "'specifically disserving to the interests of the declarant.'" (*People v. Duarte*, *supra*, 24 Cal.4th at p. 612.) "'[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context.'" (*Ibid.*) "'Even statements that are on their face neutral may actually be against the declarant's interest. . . . "Sam and I went to Joe's house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that *being linked* to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest. The question . . . is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in

light of all the surrounding circumstances.'" (*People v. Cortez* (2016) 63 Cal.4th 101, 127.)

The fact that a statement incriminates the declarant and *also* incriminates another does not necessarily render the statement inadmissible. (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1220; *People v. Wilson* (1993) 17 Cal.App.4th 271, 276.) That is, a statement can both incriminate others and specifically disserve the declarant's penal interests. (*People v. Tran*, *supra*, at p. 1220; *People v. Wilson*, *supra*, at p. 276.)

Here, Matheis's statements about his and Daniel's actions and what they learned specifically disserved his interests, when viewed in context. According to his jailhouse statements, he and Daniel picked up her daughter and found her naked, became suspicious she had been molested, took her to the hospital where an examination confirmed molestation, and concocted a plan to kill Fredieu. The specific references to Daniel—his girlfriend—and her daughter's suspected molestation were not collateral and were, in fact, quite damaging to Matheis. They provided a motive for the killing—revenge for harming someone close to him—and also showed Matheis had engaged with Daniel in a joint, planned shooting, thereby evidencing premeditation and the existence of a conspiracy to commit murder. Furthermore, his statements that they planned for Daniel to call Fredieu over and that she did make the call "provides evidence of one of the elements of a conspiracy conviction: 'the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.'" (*People v. Cortez*, *supra*, 63 Cal.4th at p. 126.) In these respects, the portions of Matheis's statements

referring to Daniel disserved his penal interests, and the court was not required to purge the references to Daniel from Erick J.'s testimony. (*See id.* at pp. 122, 126 [the defendant's out-of-court statements that he and the codefendant "'went shooting,'" and the codefendant drove the car, disserved the defendant's interests by showing premeditation and a conspiracy]; *People v. Samuels* (2005) 36 Cal.4th 96, 120-121 [the declarant's statement that the defendant paid him to commit the killing "was specifically disserving to [the declarant's] interests in that it intimated he had participated in a contract killing—a particularly heinous type of murder—and in a conspiracy to commit murder."].)

Daniel suggests, in the alternative, that there was federal constitutional error under the confrontation clause and due process clause, which require a modicum of trustworthiness in the hearsay statements. She fails to develop this argument beyond saying that "[s]tatements not specifically disserving to [a] declarant's interests do not fall within a firmly rooted exception to the hearsay rule and thus inherently lack the trustworthiness required by the federal constitution." But as we have determined, the statements at issue were indeed specifically disserving to the declarant's interests.

Moreover, although there is no litmus test for determining trustworthiness, the statements bear traditional indicia of trustworthiness, when we consider the totality of the circumstances under which they were made. (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 175 [the totality of the circumstances include "'whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was

actually said by the declarant and anything else relevant to the inquiry.'"].) The conversation between Matheis and Erick J. occurred between friendly acquaintances in a noncoercive setting—the most reliable of circumstances—and while Matheis attributed some blame to Daniel, he fully "accepted for himself an active role in the crimes" and described how he was the actual shooter. (*Ibid.*) These statements subjected Matheis to the risk of criminal liability to such an extent that a reasonable person in his position would not have uttered them unless the person believed them to be true. (*Ibid.*)

B. *Matheis's Appeal*

As discussed, Matheis's appointed counsel filed a brief under *People v. Wende*, *supra*, 25 Cal.3d 436 and *Anders v. California*, *supra*, 386 U.S. 738, requesting that we conduct an independent review of the record. We offered Matheis the opportunity to file a personal supplemental brief, which he has done. We address his contentions in turn and reject each, and pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, 119, we have also independently reviewed the record for potential error and find no arguable issues.

Matheis claims the prosecutor misstated the facts in her motion to admit his jailhouse statements. He argues the motion incorrectly stated Erick J. "was not working for any law enforcement agency." This was no misstatement. The motion noted that, at the time of the conversation between Erick J. and Matheis, Erick J. was in custody on his own charges and not working for law enforcement. While there was evidence that Erick J. contacted law enforcement *after* he and Matheis talked, there was no evidence he was working with law enforcement at the time. Matheis also takes issue with the motion's

argument that his statements to Erick J. were made in reliable circumstances and in a noncoercive setting. He points to evidence from Stanley that private communications between himself and Erick J. would have been nearly impossible in jail. Matheis is essentially impugning Erick J.'s credibility and saying the conversation between them could not have occurred. But the jury heard the evidence about the conditions under which the conversation occurred, as well as other evidence relating to Erick J.'s credibility. The jury is the arbiter of witness credibility, not this court. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Even if we disagreed with its credibility determination, we would have no cause to reverse on that ground.

Matheis also claims the prosecutor and officers committed misconduct by interviewing Kathleen P. without recording her statements or writing reports, or failing to disclose the nonexistent reports in discovery. Officers met with Kathleen P. three times. Officer Perea prepared reports of two of these meetings, and the third meeting was video recorded. There was no evidence the prosecutor failed to disclose these reports or recording. The prosecutor and her investigator apparently met with Kathleen P. a few days before trial and did not prepare a report of this meeting. The prosecutor represented that they only confirmed Kathleen P.'s statements in a prior report, and Kathleen P. did not say anything new or different. The trial court found no discovery violation. This ruling was correct. Section 1054.1, subdivision (f) requires the prosecution to disclose "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . ." But oral statements of

witnesses that are not written or recorded are not discoverable, unless they are statements of the defendant or are favorable to the defendant. (§ 1054.1, subds. (b), (f); *In re Sassounian* (1995) 9 Cal.4th 535, 543; 5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 48, pp. 111-112.) There was no showing here that Kathleen P. made statements favorable to Matheis.

Matheis raises a number of claims about the court improperly admitting inconsistent statements of Kathleen P.; that is, Kathleen P. testified to one thing, and Detective Perea testified that Kathleen P. said another thing during her interviews. Matheis has not shown error in light of the hearsay exception for prior inconsistent statements. (Evid. Code, § 1235.) Moreover, to the extent inconsistent statements showed Kathleen P. was not reliable, this evidence actually helped Matheis's case and did not prejudice it. (*People v. Jacobs* (1991) 230 Cal.App.3d 1337, 1346 [error does not require reversal unless it prejudiced the defendant].)

The same can be said for Matheis's reliance on evidence that officers "threatened" Kathleen P. with murder charges, or that they "forced" Nicholson to say he saw Daniel with a gun. This evidence was disclosed at trial. It was not prejudicial to Matheis and was, in fact, favorable to him, in that it undermined the credibility of some of the prosecution's main witnesses. Thus, even if this evidence were inadmissible—and Matheis has not explained why it would be—admitting it was harmless and even helpful.

Matheis next contends there was "a sufficient factual showing to support [his] claim of actual innocence" and that "no rational trier of fact could find proof of guilt

beyond a reasonable doubt." He discusses evidence favorable to him, particularly evidence that undermined the credibility of Erick J. and Kathleen P. or conflicted with their testimony, and evidence that the police did not follow up with potential witnesses. But on appeal, the question is whether the whole record discloses substantial evidence to support the judgment, not whether isolated bits of evidence supported his innocence. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) He has not shown insubstantial evidence supported his conviction. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574 [to prevail on a sufficiency of the evidence claim, the defendant must set forth all of the material evidence in the light most favorable to the People, and then persuade the court that the evidence cannot reasonably support the jury's verdict].)

Matheis further argues the prosecution never tried to obtain recordings of Erick J.'s jailhouse calls to Armstrong, who originally told Erick J. that Matheis was involved in something, and the prosecution therefore suppressed exculpatory evidence. "Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049.) Detective Perea indeed testified she did not try to locate any jailhouse telephone calls

between Erick J. and Armstrong. But Matheis could have easily subpoenaed any such evidence himself. The prosecution had no duty to conduct his investigation for him.

Matheis additionally argues the court violated his Sixth Amendment right to confrontation when it denied the defense's request for a continuance at the preliminary hearing stage to obtain more discovery about Erick J.'s plea deal. This contention lacks merit. Matheis has not shown how this prejudiced him when he had a full opportunity to confront and cross-examine Erick J. at trial about his plea deal, by which time Matheis had the pertinent discovery, including a copy of the plea agreement.

Matheis further contends he was prejudiced when the court allowed a witness to be present in the audience at the preliminary hearing, after it granted a motion to exclude all witnesses. When defense counsel objected that "[o]ne of the potential witnesses is in the courtroom," the prosecutor responded that she was not calling the witness. Neither the court nor the parties identified the potential witness by name. Given that the person apparently was not a witness at the hearing, we find no error.

Finally, Matheis asserts the prosecutor misstated the evidence in closing, and he cites numerous alleged instances of this. Having reviewed the prosecutor's closing and rebuttal arguments, we cannot agree. In closing arguments, "prosecutors have wide latitude to discuss and draw inferences from the evidence presented at trial. '"Whether the inferences the prosecutor draws are reasonable is for the jury to decide."'" (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) The prosecutor characterized the evidence and made inferences in favor of defendants' guilt, as she was permitted to do. Even assuming

the prosecutor had acted improperly, Matheis did not object to her remarks at trial, and he therefore forfeited a claim of prosecutorial misconduct. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.)

IV. DISPOSITION

The judgments are affirmed.

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FIELDS
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.